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BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR BOARD OF
CONTROL DECISION ON:

Statutes 1980, Chapter 1143
Claim No. 3929

Directed by Statutes 2004, Chapter 227, Sections
109-110 (Sen. Bill No. 1102)

Effective August 16, 2004

Case No. 04-RL-3929-05

***Regional Housing Needs
Determination-Councils of
Governments***

**COMMENTS OF SOUTHERN
CALIFORNIA ASSOCIATION OF
GOVERNMENTS, SACRAMENTO
AREA COUNCIL OF
GOVERNMENTS, ASSOCIATION
OF BAY AREA GOVERNMENTS,
CALIFORNIA ASSOCIATION OF
COUNCILS OF GOVERNMENTS,
AND SAN DIEGO ASSOCIATION
OF GOVERNMENTS TO DRAFT
STAFF ANALYSIS**

HEARING DATE: March 30, 2005

I. INTRODUCTION

The Southern California Association of Governments ("SCAG"), the Association of Bay Area Governments ("ABAG"), the Sacramento Area Council of Governments ("SACOG"), the California Association of Councils of Governments ("CALCOG"), and the San Diego Association of Governments ("SANDAG")¹, (collectively (the "COGs")) jointly submit their comments to the Draft Staff Analysis ("Draft Analysis") issued by the Commission on State Mandates (the "Commission"). As a threshold matter, the COGs would like to express their disappointment concerning the staff of the Commission's ("Commission Staff") failure to give any consideration of the COGs prior comments concerning this matter. Although Commission

¹ As mentioned in the COGs' rebuttal brief, although SANDAG became a statutorily created agency pursuant to Public Utilities Code Sections 132354 *et seq.* on January 1, 2003, prior to this date, it was a joint powers agency. Because the reimbursement claims predate January 1, 2003, the arguments set forth herein apply to SANDAG.

1 Staff appears to recognize the arguments made by the various parties including the COGs, its only
2 response is the following:

3 “In view of *Connell*, staff does not find convincing the various arguments
4 regarding the sufficiency or the difficulty of the basis for the fee. These
5 arguments are not relevant to the legal inquiry because the sole consideration is
6 whether COGs have fee authority.”

7 Draft Analysis at 23 (emphasis added).

8 The fact that Commission Staff does not find the COGs arguments “convincing” does not
9 provide sufficient justification for the Commission to reject the arguments without due
10 consideration. As such, the COGs respectfully urge the Commission to analyze their arguments
11 in detail, particularly with respect to the issue of the COGs lack of authority to levy a fee to its
12 members as a result of their respective joint power agreements.

13 In addition, Commission Staff also takes a giant leap of faith in concluding that a joint
14 powers authority is not included in the definition of a “local agency” pursuant to Section 17518 of
15 the Government Code despite the fact that the definition explicitly includes “authority.”
16 Commission Staff’s flawed reasoning is indicative of its intent to find any means to justify the
17 ends, i.e., to find that COGs are not entitled to reimbursement pursuant to Cal. Const. Art. XIII B
18 Section 6 (“SB 90”). The Commission should not be so misled.

19 **II. ARGUMENT**

20 **A. Commission Staff Completely Fails to Address the Arguments Set Forth in** 21 **the COGs Earlier Briefs**

22 Despite comprehensive summaries of the COGs’ arguments on pages 6-7 and 20 in the
23 Draft Analysis, Commission Staff does not address these arguments at all. As discussed above,
24 Commission Staff simply dismisses the arguments without any analysis. It simply relies on
25 Connell v. Superior Court of Sacramento County, 59 Cal.App.4th 382 (1997), in concluding:

26 “Section 65584.1’s fee authority provision grants authority to COGs for the
27 ‘council’s actual cost in distributing regional housing needs.’” The only
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1 limitation on the COG fee is that it ‘not exceed the estimated amount required to
2 implement its obligations pursuant to Section 65584.’”
3 Draft Analysis at 23. Commission Staff, however, ignores the COGs’ arguments distinguishing
4 Connell. In their rebuttal brief, the COGs asserted that the "fee" authorized by Section 65584.1 is
5 entirely different than the legitimate passing through of costs to end users, as upheld in Connell.
6 Unlike the water agencies in Connell which were able to charge a fee to end users for a specific
7 service, the COGs’ member cities and counties are expected to pass Regional Housing Needs
8 Assessment (“RHNA”) costs through to developers who are building homes in their cities and
9 counties. Cities and counties will likely be unable to accurately predict the extent of development
10 activity in their community over a given period of time. As a result, cities and counties are nearly
11 certain to either (1) underestimate the fees necessary to pay the cost of the RHNA, and thereby be
12 obligated to use local tax revenues to pay at least a portion of the cost of the RHNA, or (2) charge
13 developers too much for the cost of conducting the RHNA, and thereby violate the requirement
14 that the fees under 65104 not exceed the cost of service.

15 Commission Staff also fails to address the following arguments made by the COGs:

- 16 • If the COGs charge their members for the RHNA costs, they would effectively be
17 paying for the RHNA process themselves. This runs counter to the well-
18 established policy underlying SB 90, i.e., that states cannot shift the costs of
19 providing public services to local agencies.
- 20 • Because the COGs are governed by JPA agreements among their members, they
21 have no authority to assess fees upon their members unless the agreements set
22 forth this authority. None of the COGs’ JPA agreements empower the COGs with
23 such fee authority. By forcing the COGs to exercise this authority the Legislature
24 is unconstitutionally interfering with the JPA agreements. See Cal. Const. Art. 1 §
25 9.
- 26 • The RHNA program is a state program that was created to address the affordable
27 housing shortage in California. Notably, for areas without COGs, the State,
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1 through the Department of Housing and Community Development, determines the
2 cities and counties' share of housing need. See Cal. Govt. Code § 65584(b).
3 Thus, it is clearly in the State's interest, and not the cities' and counties' interest,
4 to complete the RHNA process. It would be contrary to the policies underlying SB
5 90 to force local agencies to shoulder the costs of this state service.

- 6 • Even if the COGs somehow have the authority to charge its members fees to
7 perform the RHNA, the member cities and counties cannot pass the fees on to
8 developers. Although cities and counties can levy fees to offset costs expended by
9 their own planning agencies, they have no authority to levy fees to offset costs
10 incurred by other agencies such as the COGs.

11 Notwithstanding Commission Staff's inexplicable decision to ignore these arguments, the
12 COGs respectfully implore the Commission to consider these important, substantive arguments in
13 its reconsideration of the subject claim.

14 **B. Commission Staff's Interpretation of the Definition of Local Agency is Not**
15 **Supported by the Plain Language of the Statute**

16 Government Code Section 17518 states: "[l]ocal agency' means any city, county, special
17 district, authority, or other political subdivision of the state." Commission Staff contends that
18 "[a]lthough the Legislature includes the word 'authority' in the definition of local agency, it is not
19 clear from the plain language of the statute what type of authority the Legislature intended to
20 include within the definition." Draft Analysis at 16. Commission Staff then argues that because
21 "[c]ities, counties, and special districts have the power to tax," "authorit[ies]" as set forth in the
22 statute must also have the same power because they must be in the same "class" by virtue of the
23 fact that the words are next to each other in the statute. Id.

24 Commission Staff takes an enormous leap here with no legal support. The fact that cites,
25 counties and special districts have the power to tax, does not mean the "authorities" must also
26 have this same power. A less strained and more reasonable interpretation is that the Legislature
27 intended to include all forms of cities, counties, and special districts including "authorities" and
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1 “political subdivisions” in its definition of “local agencies.” Joint powers authorities like COGs
2 consist of cities and counties, and the term "political subdivision" includes “any city, city and
3 county, county, tax or assessment district, or other legally authorized local governmental entity
4 with jurisdictional boundaries.” Govt. Code § 12650(b)(3).

5 This interpretation is supported by the language of the statute: “[l]ocal agency’ means
6 any city, county, special district, authority, or other political subdivision of the state.” Govt. Code
7 § 17518 (emphasis added). The use of the words “other political subdivision” implies that a city,
8 county, special district, and authority each qualify as a political subdivision of the state. Indeed,
9 this is consistent with the definition of “political subdivision.”

10 Commission Staff’s focus on the definition of “special districts” is completely misplaced
11 since the COGs have not claimed that they qualify as special districts for reimbursement under
12 SB 90. Rather, the COGs, as joint power authorities consisting of cities and counties, qualify for
13 reimbursement as “local agencies” as defined by Section 17518, which includes joint powers
14 “authorities.”


15 **III. CONCLUSION**

16
17 It is indisputable that state funds have been appropriated and paid to COGs for the RHNA
18 program since 1983, and there is no reason to deviate from this practice since the RHNA is
19 clearly a state-mandated program. None of the State’s and the COGs’ obligations have changed;
20 the only difference is the enactment of Section 65584.1. As discussed in the COGs’ earlier
21 submittals, in spite of the provisions of Section 65584.1, the COGs do not have the authority to
22 impose the RHNA fees on its members without approval from its members, nor do the members
23 have the authority to impose the fees on developers. Therefore, the Commission should affirm its
24 prior finding that the costs incurred by COGs in the RHNA process are reimbursable mandated
25 costs.

1 Dated: February 17, 2005

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8 Attorneys for Southern California Association of
9 Governments and on behalf of Sacramento Area
10 Council of Governments, Association of Bay Area
11 Governments, California Association of Councils
12 of Governments, and San Diego Association of
13 Governments

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I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Fulbright & Jaworski L.L.P., 865 South Figueroa Street, 29th Floor, Los Angeles, California 90017.

Comments of Southern California Association of Governments, Sacramento Area Council of Governments, Association of Bay Area Governments, California Association of Councils of Governments, and San Diego Association of Governments to Draft Staff Analysis

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☒ (BY FEDERAL EXPRESS) I placed the document(s) listed above in a sealed Federal Express envelope affixed with a pre-paid air bill, and caused the envelope to be delivered to a Federal Express agent for delivery.

☐ (BY FACSIMILE) I caused said document(s) to be transmitted electronically to the interested parties at the facsimile numbers as stated above on this date before 5:00 p.m.

Executed on February 17, 2005, at Los Angeles, California.

Cynthia Pacheco
Cynthia Pacheco